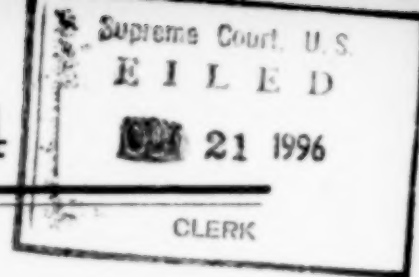


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NO. 96-454



**In the
Supreme Court of the United States**

OCTOBER TERM, 1996

ASSOCIATES COMMERCIAL CORPORATION,
Petitioner,

V.

ELRAY RASH AND JEAN RASH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS BRIEF BY HIBERNIA NATIONAL BANK
IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI
BY ASSOCIATES COMMERCIAL CORPORATION

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Now comes, Hibernia National Bank, an amicus curiae in the Fifth Circuit, and moves the Court for leave to file this amicus curiae brief in support of Associates Commercial Corporation's petition for writ of certiorari. Pursuant to Supreme Court rule 37(2) (b), Hibernia requested consent from counsel representing Elray and Jean Rash, and from the Chapter 13 Trustee of the Rash case, to the filing of this brief. Hibernia's counsel had no reply to her letters of October 9, 1996, or her phone calls of October 16, 1996, from counsel for the Rashes. The trustee has consented. Accordingly, Hibernia National Bank prays that this Court grant it leave to file this amicus brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether, when a debtor proposes to retain a secured creditor's collateral under the cramdown powers of chapter 13 of the Bankruptcy Code, the amount required to be paid on account of the creditor's secured claim is limited to the value that the secured creditor could have obtained if it had sold the collateral at foreclosure.

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IN THE
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OCTOBER TERM, 1996

No. 96-454

ASSOCIATES COMMERCIAL CORPORATION,
Petitioner,

V.

ELRAY RASH AND JEAN RASH,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**AMICUS BRIEF BY HIBERNIA NATIONAL BANK
IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI
BY ASSOCIATES COMMERCIAL CORPORATION**

Amicus respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case, 90 F3d 1036 (5th Cir. 1996) (en banc).

INTEREST OF AMICUS CURIAE

Hibernia National Bank is a national bank, organized under the laws of the United States, with its principal place of business in New Orleans, Louisiana. It has branches statewide in Louisiana. Proceedings in all of the bankruptcy courts in Louisiana are governed by the *Rash* decision.

OPINIONS

The opinions in this matter are listed in petitioner's writ application and are found in its appendix, which amicus adopts herein by reference.

STATUTORY PROVISIONS INVOLVED

11 USC § 506 (a) provides:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 1325 (a) (5) provides:

(a) Except as provided in subsection (b), the court shall confirm a plan if-

(5) with respect to each allowed secured claim provided for by the plan-

(A) the holder of such claim has accepted the plan

(B) (i) the plan provides that the holder of such

claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder...

STATEMENT OF THE CASE

This case presents an important and recurring issue as to the respective rights of chapter 13 debtors and their secured creditors, which has divided several courts of appeals. Specifically, at issue here is the standard for determining the amount that a debtor is required to pay to his secured creditors when he seeks to retain their collateral, over their objection, in a chapter 13 plan. Is the debtor required, as the court below held, to pay the secured creditor only that amount which the creditor could have received if it had sold the collateral at foreclosure, or is the debtor required, as other circuits have held, to pay the value of the collateral as used by the debtor for the purposes contemplated in the plan (i.e., fair market or retail value)?

Some 250,000 chapter 13 cases are filed each year, and, because the vast majority of debtors have secured loans, the issue presented is likely to arise in most of them, with a resulting annual aggregate economic impact in the hundreds of millions of dollars. Moreover, the question is a fundamental one in bankruptcy, which the court below recognized requires a national uniform rule. Only this Court can provide that uniformity.

SUMMARY OF THE ARGUMENT

The decision below creates an acknowledged conflict among the circuits as to an issue that is fundamental to the administration of the Bankruptcy Code, *viz*, what value must be paid on account of a secured claim if the debtor keeps the collateral? The *en banc* decision not only departs from the views of the other courts of appeals, but is contrary to the plain statutory language and this Court's approach to § 506 in *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988), *Dewsnup v. Timm*, 502 U.S. 410 (1992), and *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). For these reasons, this case merits review by this Court to ensure a uniform interpretation of 11 U.S.C. § 506 (a).

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT

Amicus adopts this portion of Petitioner's brief by reference thereto, as if copied herein *in extenso*.

II. THE ISSUES HERE PRESENTED ARE OF SUBSTANTIAL ECONOMIC IMPORTANCE

Hibernia National Bank is the largest bank in the state of Louisiana with 199 branches in 29 of 64 parishes (counties). Hibernia's Louisiana markets represent approximately 88% of the state's population and deposits. With the recent amendments to the Bankruptcy Code, Hibernia has seen

the number of Chapter 13 bankruptcy filings increase dramatically. In 1993, Hibernia participated in 182 Chapter 13 bankruptcies, of which 141 involved secured claims, 121 of which were vehicles. In 1994 it handled 163 Chapter 13s which involved 128 secured claims, 114 of which were vehicles. In 1995 Hibernia was involved in 268 Chapter 13s, 196 of which were secured, 163 of which were vehicles. For the first nine months of 1996, the numbers have increased yet again. We have been involved in 536 Chapter 13s, 386 of which were secured involving 325 vehicles.

Most of the Chapter 13s that Hibernia deals with involve vehicles, typically passenger cars and pickup trucks. The difference between the N.A.D.A.¹ retail and wholesale (liquidation) value for these vehicles typically averages between \$1200 to \$2000 per vehicle. The numbers are higher if a luxury car or truck is involved, usually \$2500 to \$5000. Probably of even more importance to Hibernia is the fact that if the retail value is used, it is often fully secured, which is important in the number of cases where the debtor has made few, if any payments. Debtors often purchase a brand new vehicle, make no payments, and then "strip down" the value of the vehicle and lien, by using the wholesale number to value the vehicle in their Chapter 13 bankruptcy.

Of equal concern to Hibernia, is that there is no uniform rule among the bankruptcy judges in Louisiana as to how vehicles are to be valued. One judge in the Western District only uses liquidation value. Another judge in the Western District averages the three values listed in the NADA book,

¹ N.A.D.A. Official Used Car Guide, published monthly by the National Automobile Dealers Association.

retail, wholesale and loan to arrive at yet another number. Where the parties cannot agree on value, the judge in the Middle District considers the totality of the circumstances and arrives at a number. The judges in the Eastern District usually use liquidation value. The identical vehicle simply cannot have a far different value solely based upon the district in which the debtor resides. But that is the effect of the en banc *Rash*² decision. Thus how secured creditors are treated in the bankruptcy courts in Louisiana is totally dependent on what judge ends up handling the case. There is no uniform rule. Surely Congress did not intend this roulette-like result when it adopted the Chapter 13 provisions.

This Court should grant review of this case and resolve the meaning of 11 USC §506(a) so that there is a uniform rule through out the United States as to valuation of secured collateral retained by a debtor in Chapter 13. Disparate treatment of secured creditors based solely on the district of the debtor's residence should be ended.

² *Matter of Rash*, 90 F3d 1036 (5th Cir. 1996)(en banc).

CONCLUSION

The petition for certiorari filed by Associates Commercial Corporation should be granted.

Respectfully submitted

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October 21, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion For Leave To File Amicus Brief and Amicus Brief By Hibernia National Bank In Support Of Petition For A Writ of Certiorari By Associates Commercial Corporation has been served upon Robert Barron, P.O. Box 1347, Nederland Texas 77627, (409) 727-0073 and John J. Durkay, P.O. Box 16, Beaumont, Texas 77704, (409) 835-5011, counsel for Debtors Elray and Jean Rash, Michael Gross, Standing Chapter 13 Trustee, 110 N. College Avenue, Suite 1400, Tyler, Texas 75702, (903) 593-7777, Trustee, Carter G. Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000 and Ben L. Aderholt, 1200 Smith Street, Suite 1400, Houston, Texas 77002, (713) 658-1818, counsel for Associates Commercial Corporation, in the above-captioned proceeding, postage prepaid and properly addressed, this 21st day of October, 1996.

Anita M. Warner